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Recommended Citation

Nanette Dembitz, *Ferment and Experiment in New York Juvenile Cases in the New Family Court*, 48 Cornell L. Rev. 499 (1963)
Available at: <http://scholarship.law.cornell.edu/clr/vol48/iss3/3>

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FERMENT AND EXPERIMENT IN NEW YORK: JUVENILE CASES IN THE NEW FAMILY COURT

Nanette Dembitz†

The juvenile court is now in the third stage in the cycle of social reform: reforms, regrets, and revisions. In the past decade legislative commissions in a number of states have been evaluating the realities of the vision of the early 1900's, of a court to help children.¹ One of the more thoroughgoing studies was New York's. It resulted in a completely restructured juvenile court law, which is incorporated in New York's new Family Court Act.²

The New York Family Court Act changed the procedures relating to juveniles, at the same time as it created a new court with a new combination of jurisdiction. A "Family Court" is intended to have jurisdiction over the variety of actions rooted in family relationships or family deterioration that are conventionally divided among a number of civil and criminal courts—adoptions, matrimonial actions, paternity, support of dependents, child custody, minor crimes among family members, and juvenile cases—to name the chief categories.³

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¹ In an early, now classic, statement, the aim of the juvenile court was "not so much to punish as to reform"; the child was not viewed as guilty, but "either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the intervention of the public authorities"; and the judge was not to determine whether he had "committed a specific wrong, but what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state. . . ." Mack, "The Juvenile Court," 23 *Harv. L. Rev.* 104, 107, 119-20 (1909).

Beginning in this country in 1899, juvenile courts spread throughout the United States, as well as other countries, handling violations of law by children and other children's cases, by noncriminal proceedings. The maximum jurisdictional age for most juvenile courts in this country is 18. See Cosulich, *Juvenile Court Laws of the United States* (1939); Ketcham, "The Unfulfilled Promise of the Juvenile Court," 7 *Crime & Delin.* 97, 99, 100 (1961); Kohler, "The Courts for Handling Youth," 2 *Nat'l Prob. & Parole Ass'n J.* 123 (1956).

For recent reports by legislative commissions, in which the juvenile court was either a primary or the sole concern: Report of Minnesota Legislative Interim Comm'n on Pub. Welfare Laws (1959); Report of Governor's Special Study Comm'n on Juvenile Justice, pt. I (California 1960) (hereinafter referred to as California Report); Report of N.Y. Joint Legislative Comm. on Court Reorganization, pt. II, *The Family Court Act* (1962); Report of Oregon Legislative Interim Comm. on Judicial Administration, pt. II, *Juvenile Law* (1959); Report of Comm. of Legislative Council of Wisconsin on Revision of Children's Code (1955).

² N.Y. Sess. Laws 1962, ch. 686, hereinafter termed N.Y.F.C.A.

³ See Gellhorn, *Children and Families in the Courts of New York City* 3-20 (1954); Alexander, "What is a Family Court, Anyway?" 26 *Conn. B.J.* 243, 245-46 (1952); Foster, "The Family in the Courts," 17 *U. Pitt. L. Rev.* 206 (1956); *Standard Family Court Act* art. II (Nat'l Prob. & Parole Ass'n 1959).

The crusade for family courts has resulted in over a dozen courts scattered throughout the country approximating the pattern of jurisdiction urged by family court proponents.⁴ New York comes close to the jurisdictional ideal in the number of different types of actions placed in the Family Court.⁵ However, to those who regard a family court as primarily an agency to prevent or deal with the dissolution of a marriage,⁶ the new New York court is deficient because it does not have jurisdiction over divorces, separations, or annulments, nor can it force married couples to try conciliation. With discouraging results from compulsory conciliation elsewhere, the New York Legislative Committee merely recommended, and the Legislature merely enacted, that the Family Court should make "available an informal conciliation procedure to those whose marriage is in trouble."⁷ The only compulsory feature of the New York

⁴ See Teeters & Reinemann, *Challenge of Delinquency* 376 (1950); Virtue, *Family Cases in Court* 175, 192, 212 (1956); Young, *Social Treatment in Probation and Delinquency* 217 (1952); Chute, "Divorce and the Family Court," 18 *Law & Contemp. Prob.* 49, 53-63 (1953); "Family Courts: A Symposium," 27 *Tenn. L. Rev.* 357, 362 (1960).

Both lay and legal groups urge the creation of family courts in their locality. Hickey, "Docket of Human Understanding," *Ladies' Home J.* 21 (July 1958); Essex County, N.J., Bd. of Freeholders, *Problems Presented in Juvenile and Domestic Relations Court* 19 (1958); Foster, *supra* note 3; Report of New Jersey Supreme Court's Comm. on Conciliation and Reconciliation (Feb. 1963); Canadian Welfare Council, *The Family Court in Canada* 15-17 (1954). The New York Family Court had been advocated vigorously since at least 1954. See Community Service Soc'y of N.Y., *New Patterns for Family Justice* (1954); Recommendations of N.Y. Judicial Conf. for Modernization of Court Structure (1958); Gellhorn, *supra* note 3, at 3-16.

⁵ N.Y.F.C.A. provides for jurisdiction of the state-wide Family Court over parental neglect (art. 3); support of dependents (art. 4); paternity proceedings (art. 5); termination of parental custody because of permanent neglect (art. 6, pt. 1); adoption (art. 6, pt. 2) (eff. Sept. 1, 1964); custody of a minor, on referral from the New York supreme court (art. 6, pt. 3); juvenile delinquency and proceedings regarding children "in need of supervision" (art. 7); family offenses (art. 8); conciliation of spouses (art. 9). While the New York supreme court continues to hold jurisdiction over matrimonial actions, it may refer support and custody questions to the Family Court (art. 4, pt. 6; art. 6, pt. 3).

The Rhode Island Family Court Act of 1961, R.I. Gen. Laws Ann. §§ 8-10-1 to -45 (Supp. 1962), establishes a court of jurisdiction similar to New York's, with jurisdiction over matrimonial actions in addition.

The New York and Rhode Island family courts are exceptional in the scope of their jurisdiction, and also in the fact that they are state-wide instead of being established for only one county or city.

⁶ See Alexander, "Family Court of the Future," *Nat'l Prob. & Parole Ass'n Yb.* 129, 144 (1951); Chute, *supra* note 4, at 31-32, 49-65; Sayre, "Divorce for the Unworthy: Specific Grounds for Divorce," 18 *Law & Contemp. Prob.* 26, 31-32 (1953). Reformers emphasize conciliation, and some also would determine matrimonial actions on the basis of whether the marriage is viable, rather than legal rights and specific grounds for dissolution.

⁷ N.Y.F.C.A. § 911. For reports on conciliation in California and New Jersey, see New York Leg. Doc. No. 19, at 35-36 (Report of Joint Legislative Comm'n on Matrimonial and Family Laws 1961); Fain, "The Lawyer's Role in California Reconciliation Court Plan," Proceedings: Family Law Section, Ann. Bar Ass'n 211 (1962). For survey of various methods, see Gellhorn *supra* note 3, ch. 14; Virtue, *supra* note 4, at 177, 212, 217-18; Comment, "The Work of the 1939 California Legislature," 13 *So. Cal. L. Rev.* 1, 41-43 (1939).

Compulsion to attempt conciliation has been attacked as unconstitutional, in part as a denial of access to the courts to secure relief in a matrimonial action. *People ex rel. Christiansen v. Connell*, 211 Ill. 2d 332, 118 N.E.2d 262 (1954); compare *Truax v. Corrigan*, 257 U.S. 312 (1921).

Some argue that even the filing of a complaint deepens antagonism, see "The Family

procedure is that if a wife or husband chooses to file a conciliation petition, the court can direct his spouse to attend two conciliation conferences.⁸

A family court's combination of jurisdiction cures the inefficiency and the hardships to the litigants of fragmenting one complex of problems among a number of courts.⁹ To take one example from the New York act, in a proceeding based on disorderly conduct between family members, the Family Court may direct the filing of a neglect, support or paternity petition, and consolidate the proceedings.¹⁰ Under traditional jurisdictional arrangements in New York and elsewhere, the same family would be the subject of a new proceeding in a different court with the need to compile a new record, whenever a form of proceeding or remedy was found inadequate.

A Family Court, ideally, is to focus on individual and family needs rather than on traditional legal culpability. Thus, the New York act, establishing the Family Court's jurisdiction over disorderly conduct charges between family members, states that the purpose of such charges generally "was not to secure a criminal conviction and punishment, but practical help."¹¹ Disorderly conduct will therefore be handled in Family Court by civil remedies, such as orders of protection prohibiting or directing certain conduct between family members.¹² To help diagnose family relationships and needs, the Family Court's auxiliary services—its staff of social workers and others trained in the behavioral sciences—are to function in all the proceedings under its roof.¹³ A family court is viewed as an extension of the juvenile court's "helping" approach to other proceedings. The purpose is, as an early social crusader put it, to establish a court for "consideration of all matters relating to the family . . . in which the same methods of procedure shall prevail as in the juvenile

Part, A Report of Special Committee on the Family Part of Supreme Court," 12 Record of N.Y.C.B.A. 89, 97 (1957), and should not be permitted prior to an attempt to conciliate. A similar view on marital disharmony is reflected in the rule on exclusion of a spouse's adverse testimony. See *Hawkins v. United States*, 358 U.S. 74, 77-78 (1958); *Wyatt v. United States*, 362 U.S. 525, 526-27 (1959).

⁸ N.Y.F.C.A. § 924. Even this degree of compulsion was opposed by a committee of the Bar Ass'n of New York City. See Report of Special Comm. on Reorganization of Courts viii (1962).

The Rhode Island act provides that the Family Court may "suggest and hold" conciliation conferences. R.I. Gen. Laws Ann. § 8-10-5 (Supp. 1962).

⁹ Unfortunately, the goal may not be fulfilled in practice, and the judge in one part of an integrated court may not consider the records compiled in another. See *Virtue*, supra note 4, at 47, as to family cases in the California Superior Court in San Francisco.

¹⁰ N.Y.F.C.A. § 815.

¹¹ Id. § 811.

¹² Id. §§ 841, 842. The Family Court may refer any such proceeding to a criminal court if it decides that its processes are inappropriate. Id. § 814. For failure to obey a Family Court order, the Court may order a jail sentence for a maximum of six months. Id. § 846.

¹³ Gellhorn, supra note 3, at 9, 384.

court and in which it will be possible to consider social evidence as distinguished from legal evidence."¹⁴

But cutting across the current for extension of the juvenile court approach to other family-centered cases, has been a rip-tide of criticism of juvenile court procedure,¹⁵ reflected in the legislative studies of the last few years. This article will primarily consider how the New York legislators dealt with the major problems since New York's changes are among the most thoroughgoing, but it will also advert to the laws of other states. One important procedural matter to be analyzed is the disclosure or confidentiality of the "social evidence"—of the psychological, medical, and social information—that is the basis for evaluating the individual's needs. This question cuts across all family court proceedings, and will become increasingly significant the more the therapeutic approach is adopted. Here we shall suggest that there should be valuable cross-pollination between juvenile and other proceedings in the family court: a borrowing of the best of each.

Except for the use of social evidence in the various Family Court actions, this article will only consider New York's new provisions with respect to juvenile proceedings. Outside the juvenile field, the changes effected by the New York Family Court Act are largely a consolidation of jurisdiction. While it is significant that this consolidation was based on the family as the matrix of actions, the details depend on the pre-existing court system and other local conditions, and do not hold general interest.

WHO IS A JUVENILE DELINQUENT?

New York departed from typical juvenile court laws, by limiting the definition of juvenile delinquency.

The traditional juvenile court theory is that the court is considering the "whole child" and that the gravity of his violation of law is not of much significance in determining his needs. The statutes typically define a delinquent as a child who has violated any kind of law or ordinance. Whether he has thrown newspaper on the street in disobedience of the anti-littering ordinance or committed a serious robbery, he is a "de-

¹⁴ Judge Charles Hoffman, quoted in Young, *supra* note 4, at 217.

¹⁵ See Kahn, *Court for Children* 23 (1953); Antieau, "Constitutional Rights in Juvenile Courts," 46 *Cornell L.Q.* 387 (1961); Ketcham, *supra* note 1; Long, "Headaches of a Judge—A Challenge to the Bar," 27 *Wash. L. Rev.* 130 (1952); McKay, "Juvenile Court as a State Responsibility," *Nat'l Prob. & Parole Ass'n Yb.* 120 (1951); Paulsen, "Fairness to the Juvenile Offender," 41 *Minn. L. Rev.* 547-48 (1957).

While many of the critics argue that there has been too wide a departure from the protections accorded in other judicial hearings, it is interesting that in Sweden determinations as to children under fifteen, including orders of commitment, are made administratively. Nyquist, "How Sweden Handles Its Juvenile and Youth Offenders," 20 *Fed. Prob.* 36 (1956); Sellin, "Sweden's Substitute for Juvenile Court," 261 *Annals* 146 (1949).

linquent," and in all delinquency cases the judge has authority to use the same measures, ranging from a word of advice to committing the child to an institution for an indeterminate period.¹⁶

The all-inclusive definition of delinquency has drawbacks, when combined with the principle that the court cannot consider the child's personality and tendencies until it first determines whether it has jurisdiction over him by virtue of his violation of law.¹⁷ Children have been held delinquent for minor violations of law though they showed no other symptom of delinquency. Appellate courts disapproved and reversed, despite the terms of the statute.¹⁸ Calling such a child delinquent was out of keeping with the basic theory of appraising the whole child, and was to judge him rigidly and intolerantly by adult criminal standards. Moreover, appellate courts have ordered probation instead of commitment when commitment seemed too harsh for a particular child,¹⁹ again despite the statute's broad grant of authority to the juvenile court judge and despite the practice in criminal cases of acceptance of the trial judge's evaluation of the individual's fitness for probation.²⁰

Faced with the question of whether the statute itself should limit the judge's powers—particularly in view of the infrequent appeals and in-

¹⁶ See laws collected in Cosulich, *supra* note 1; Sussmann, *Law of Juvenile Delinquency* (1950).

The Standard Juvenile Court Act § 8, 5 Nat'l Prob. & Parole Ass'n 323, 344 (1959), abandons the term "delinquent" because it is viewed as a stigma, and a minority of the states follow this practice. E.g., Oregon (by a 1959 provision) and Virginia refer to children who violate state, federal or local laws merely as children under the jurisdiction of the court: Ore. Rev. Stat. § 419.476 (1961); Va. Code Ann. § 16.1-158 (1950). See Brown, "The Virginia Juvenile Court Law of 1950," 8 Wash. & Lee L. Rev. 17 (1951). California refers to this category of children as "ward of the court." Cal. Welfare & Inst'ns § 602 (1962).

¹⁷ The emphasis on a distinct initial determination of jurisdiction, was to counter the possibility of the judge issuing an order merely on his impression that the child "should have some correction." See *People v. Pikunas*, 260 N.Y. 72, 74, 182 N.E. 675, 676 (1932). See also *Matter of Green*, 123 Ind. App. 81, 108 N.E.2d 647 (1952). The California Commission observed that:

juvenile courts do not distinguish between the jurisdictional facts and the social data at the hearing. Consequently, wardship is sometimes decided on issues that evolve from a social investigation even though the jurisdictional facts have not been clearly substantiated. . . . A two-stage hearing procedure is essential.

California Report, note 1, at 28. The New York act explicitly provides for a distinct adjudicatory phase before the dispositive phase. N.Y.F.C.A. § 746.

¹⁸ *Matter of Sanders*, 168 Neb. 458, 96 N.W.2d 218 (1959); *Jones v. Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946); *State ex rel. Shaw v. Breon*, 244 Iowa 49, 55 N.W.2d 565 (1952); cf. *Matter of Barkus*, 168 Neb. 257, 95 N.W.2d 674 (1959); *Reyna v. State*, 206 S.W.2d 651 (Tex. Civ. App. 1947).

¹⁹ *Matter of La Flair*, 286 App. Div. 943, 143 N.Y.S.2d 80 (3d Dep't 1955); *Matter of Anonymous*, 281 App. Div. 1061, 121 N.Y.S.2d 281 (3d Dep't 1953); *Matter of Angle*, 275 App. Div. 884, 88 N.Y.S.2d 817 (3d Dep't 1949). See also *McDaniel v. Shea*, 278 F.2d 460, 462 (D.C. Cir. 1960); *Cantu v. State*, 207 S.W.2d 901 (Tex. Civ. App. 1948); *Sayre, "Awarding Custody of Children,"* 9 U. Chi. L. Rev. 672, 691 (1942).

²⁰ Hall, "Reduction of Criminal Sentences on Appeal," 37 Colum. L. Rev. 521, 522, 762, 775-77 (1937); Note, 75 Harv. L. Rev. 416 (1961).

frequent occasions for appellate correction of abuses²¹—the New York act first of all restricts the law violations warranting a delinquency charge to violations amounting to a crime.²² The theory throughout the criminal law in treating some acts as offenses and others as crimes (misdemeanors or felonies) is that the former do not indicate an "evil nature," seriously at war with society.²³ Assuming the Legislature has been wise in its selection of acts for the "offense" category, there is not a great probability that children who commit offenses are potential criminals—no greater probability than if the court took jurisdiction over children who were, let us say, retarded three years in school.²⁴ The logic of distinguishing traffic offenses from serious violations of law, as several states do, seems applicable to other offenses as well.²⁵ While the juvenile court's delinquency jurisdiction was designed to remove children from the criminal courts, inclusion of every child who could have been brought into the latter may stretch the juvenile court's resources without commensurate advantage.

²¹ The great paucity of appeals is attributable to parental acceptance of the juvenile court's order—whether born of conviction or of indifference or despair—and lack of representation by counsel. The California Commission remarked on the fact that "the meaning of many statutes remains undefined" because of the dearth of appellate decisions. First Interim Report of California Special Study Comm'n on Juvenile Justice 20 (1959).

²² N.Y.F.C.A. § 712(a).

New York is exceptional. Most of the laws, including recent revisions, continue to classify commission of an offense as delinquency. E.g., Minn. Stat. Ann. § 260.015(5) (Supp. 1962); Ore. Rev. Stat. § 419.476(1)(a) (1961); Wis. Stat. Ann. § 48.12 (1957); Conn. Gen. Stat. Rev. 17-53 (Supp. 1961); Mo. Ann. Stat. § 211.031(1)(d) (1962); Va. Code Ann. § 16.1-158 (1950). See Conway, "The Juvenile Court System in Wisconsin," 34 Wis. B. Bull. 21, 25 (Feb. 1961).

However, in Iowa delinquency does not include violations below the grade of an indictable misdemeanor unless habitual, Iowa Code Ann. § 232.30 (1949), and the law in Texas is similar, Tex. Rev. Civ. Stat. Ann. art. 2238-1, § 3 (Supp. 1962). In New York such habitual violation could subject the child to adjudication under the jurisdictional section dealing with children beyond the control of lawful authority.

²³ Thus, conviction for an offense cannot be used to impeach credibility because it does not reflect on moral character. See *Ando v. Woodberry*, 8 N.Y.2d 165, 168, 168 N.E.2d 520, 522, 203 N.Y.S.2d 74, 76-77 (1960); *People v. Brown*, 2 App. Div. 2d 202, 203-04, 153 N.Y.S.2d 744, 746 (4th Dep't 1956); *Merkling v. Ford Motor Co.*, 251 App. Div. 89, 96, 296 N.Y. Supp. 393 (4th Dep't 1937).

²⁴ That a child committing minor violations may be seriously disturbed, as the California Commission indicated (California Report, *supra* note 1, at 21), is not the crucial consideration. The question is the probability the child is disturbed in a manner that will be manifested by criminality, for the juvenile court is not designed to deal with every type of disturbance. Only a small percentage of disturbed children become delinquent. Geis, "Juvenile Justice: Great Britain and California," 7 *Crime & Delin.* 111, 117 (1961).

²⁵ California's new law provides for initial hearings on juvenile traffic violations before a "traffic hearing officer." That officer may order disciplinary measures short of commitment, but may, if such measures seem to him inadequate, refer the child for a hearing before the juvenile court judge. Cal. Welfare & Inst'ns § 564 (1962). The Minnesota and Oregon laws are somewhat similar. Minn. Stat. § 260.193 (Supp. 1962); Ore. Rev. Stat. § 419.535 (1961); see also Kan. Gen. Stat. Ann. §§ 38-802(e), 38-826(c) (Supp. 1961). Wisconsin, however permits a delinquency adjudication on the basis of a traffic violation, without any special procedure. Wis. Stat. Ann. § 48.36 (1957). For discussion of traffic offenses by juveniles, see Weinstein & Robins, "The Juvenile Court in Missouri: 1957-1959—A Survey of Current Developments and Future Requirements," 1959 Wash. U.L.Q. 373, 400.

The New York act is not entirely clear on the related issue in delinquency adjudication—is a child “delinquent” because of his violation of law, without regard to any other circumstances? A possible and desirable interpretation of the statute is that an adjudication of delinquency requires two steps: first, a finding that the child has committed a violation of law amounting to a crime; and second, a determination based on the child’s background and behavior—on the whole child—that he is likely, without state supervision, to continue to disobey societal standards.²⁶ With this sort of formula, a delinquency adjudication differs from a criminal conviction in its components, rather than merely in its procedure or terminology. And a commentator on the new Minnesota act, who was a member of the drafting commission, advises that it be interpreted as here suggested for the New York act.²⁷

California’s experience illustrates the frustrations involved in mere semantics. California avoided the stigma of the term delinquent by referring to all children under the court’s jurisdiction as “ward[s] of the court.” But “ward of the court” came to have the same unfavorable connotation as “delinquent,” which then afflicted even the children who were “wards” only because of neglect by parents; a more specific term is now used for the latter group.²⁸

CHILDREN WHO HAVE NOT VIOLATED THE LAW

The typical juvenile court act classes as delinquents, besides children who have broken laws, those who are “ungovernable,” truant, associate with bad companions, have other specified habits, or, in a catchall phrase used in many statutes, engage in conduct endangering their own welfare.²⁹

One of the most controversial issues tackled in the New York and

²⁶ See N.Y.F.C.A. § 731(c); but cf. §§ 712(a), 742, 743.

²⁷ Pirsig, “Juvenile Delinquency and Crime: Achievements of the 1959 Minnesota Legislature,” 44 Minn. L. Rev. 363, 378 (1960).

Though a violation of law suffices for an adjudication under the California law, it requires additional findings before the child can be taken from the physical custody of his parent or guardian. Cal. Welfare & Inst’n § 726 (1962). See Advisory Council of Judges of Nat’l Council on Crime and Delin., Procedure and Evidence in the Juvenile Court 72 (1962), recommending a requirement of such findings; see also *McDaniel v. Shea*, 278 F.2d 460 (D.C. Cir. 1960); *Cantu v. State*, 207 S.W.2d 901 (Tex. Civ. App. 1948); *Reyna v. State*, 206 S.W.2d 651 (Tex. Civ. App. 1947); *Sayre*, supra note 19; compare *Matter of Christiansen*, 119 Utah 361, 227 P.2d 760 (1951).

²⁸ California Report, supra note 1, at 19. Compare Cal. Welfare & Inst’n §§ 600, 601, 602 (1962), with former §§ 700, 735. See Mo. Ann. Stat. § 211.031 (1962), which is similar to California’s former law.

²⁹ See *Cosulich*, supra note 1; *Sussmann*, supra note 16; *Teeters & Reinemann*, supra note 4, at 297. These provisions refer to continuous or repeated behavior rather than one act. See *State ex rel. Shaw v. Breon*, 244 Iowa 49, 55 N.W.2d 565 (1952); *People v. Pikunas*, 260 N.Y. 72, 182 N.E. 675 (1932); *Reyna v. State*, 206 S.W.2d 651 (Tex. Civ. App. 1947); see *Pirsig*, supra note 27 as to new Minnesota act. Besides broadly described behavior, these provisions usually include specific acts such as use of profane language.

California revisions was how to handle this group. There are no compilations showing the specific conduct adjudicated delinquent under these broad provisions, but the usual case seems to be of a mother complaining that a teen-ager stays out late, has unfit companions, talks back to her, and, most frequently, that an unmarried daughter is having sexual relations.³⁰

In England the juvenile courts do not have this broad "pre-delinquency" jurisdiction and its abandonment here is sometimes suggested.³¹ In this class of cases there is no need for judicial power, as in the case of crimes, in order to protect the community from a child who is harming others or to deter violations of law by other children. The goal is only to help the child and prevent his further departure from social norms (and incidentally to give surcease to the parents or other embattled authorities). Arguing against this jurisdiction, is the lack of knowledge of whether self-injuring "delinquent" behavior is an index of adult criminality to the same extent as is a child's commission of a crime.³² As a sociologist put it: "What he has done may often be the most revealing evidence of what he is."³³ From a juridical standpoint, the "pre-delinquent" standard is vague and indefinite, leaving room for the judge to enforce his personal values on sex, parent-child relations, and the good life.³⁴ Further, the child perceives commitment to an institution, regardless of the treatment goal, as at least partly punitive;³⁵ so, there is an aura of the same kind of injustice experienced from a vague penal statute that does not give clear warning, or that imposes a sanction on a "status" rather than specific acts.³⁶ Finally, critics of "pre-delinquency" jurisdiction point out that the usual parent-complainant has been inadequate or neglectful, hostile and punitive. The punitive attitude to a child who is already emotionally deprived should not be intensified

³⁰ Opinions are practically never written by the juvenile court and appellate decisions are too few to use as estimates of the court workload; the above statement is based on personal observation and discussions of the work of the courts.

³¹ See Abbott, *The Child and the State* 337 (1938); Diana, "Rights of Juvenile Delinquents," 47 J. Crim. L., C & P.S. 561 (1951); Geis, *supra* note 24, at 111, 117; Rubin, "Legal Definition of Offenses by Children and Youths," 1960 U. Ill. L.F. 512-15; Rubin, "Legal Character of Juvenile Delinquency," 261 *Annals* 2-4 (1949).

³² As to delinquency as an index of adult criminality, see Young, *Social Treatment in Probation and Delinquency* 14 (1952).

³³ See Allen, "The Borderland of the Criminal Law: Problems of 'Socializing' Criminal Justice," 32 *Social Science Rev.* 107, 117 (1958).

³⁴ Compare *Burstyn v. Wilson*, 343 U.S. 495, 504 (1952), with *Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954), holding respectively that the terms "sacrilegious" and "immoral" as applied to movie licensing, were excessively vague; *United States v. Cardiff*, 344 U.S. 174, 176 (1952) as to the unconstitutionality of statutory terms that are "vague and fluid."

³⁵ See Allen, *supra* note 33, at 116.

³⁶ Compare *People v. Munoz*, 9 N.Y.2d 51, 172 N.E.2d 535, 211 N.Y.S.2d 146 (1961); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

by a delinquency proceeding; instead, it is argued, the problem should be treated by social case-work, voluntarily accepted.

Having said all this, it goes against the paternalistic and humanitarian grain to forego state authority over a fifteen-year old who is promiscuous, wanders the streets until 3 a.m., spends her afternoons at beer parties; and then to leave to her volition whether to accept guidance or more restraining custody than her parents afford. And the situation of a desperate parent who feels responsible but impotent to exercise control, is unparalleled outside the parent-child world.

NEW YORK'S SOLUTION

There was heated criticism of the initial proposal of the New York revisors to scrap the commitment power in "pre-delinquent" cases.³⁷ Their final recommendation, and the present legislation, provides for the same powers over children who are "ungovernable or habitually disobedient" as over children who have broken the criminal laws, except that it may not be possible to commit the former to state training schools.³⁸ These schools are viewed by some as more punitive, or a more drastic restraint and interference with the child's freedom, than other state facilities or "homes" maintained by philanthropic organizations.³⁹ California and Kansas make somewhat similar distinctions for this type of case.⁴⁰

Whether the distinction is valid involves practical, operational issues

³⁷ See Report of New York Joint Legislative Comm. on Court Reorganization, pt. II, at 125-26.

³⁸ N.Y.F.C.A. §§ 756 and 758 would appear to make a distinction in the commitment power as to these two categories of children. However, in *Doe v. Doe*, 36 Misc. 2d 611, 234 N.Y.S.2d 688 (Fam. Ct. N.Y.C. 1962), a Family Court judge interpreted the act as permitting commitment to a training school (while noting that the Department of Social Welfare did not agree with this interpretation), and the decision has not been appealed.

In April, 1963, the New York Legislature enacted an amendment (not yet approved by the Governor) temporarily authorizing commitment of children in the "ungovernable" category to state training schools. The authorization expires July 1, 1964 so the issue will again be debated.

³⁹ Thus, under New York law no child under twelve could be committed to a training school unless he had committed an act amounting to a felony, N.Y. Soc. Welfare § 430(3), and a child who did not adjust in other institutions could be transferred to a training school, but only after an additional hearing. *Matter of Smith*, 92 N.Y.S.2d 529 (Child. Ct. Erie County 1949). See Missouri provision, *infra* note 59.

However, a prominent social worker urges that the training schools are not and should not be viewed as less rehabilitative than other agencies, and also that the treatment needs of children do not depend on whether they have or have not violated the law. Address by Dr. Alfred Kahn at First Ann. Conf. of N.Y. State Training Schools (Sept. 1962).

A side note is the decision holding racial segregation invalid in a state training school, even if permissible in a prison, on the ground that the school bears "no resemblance" to the latter. *Myers v. State Bd. of Pub. Welfare*, 224 Md. 246, 167 A.2d 765 (1961).

⁴⁰ Cal. Welfare & Inst'ns §§ 730, 731, 777 (1962); California Report, *supra* note 1, at 21; Kan. Gen. Stat. §§ 38-802(d), 38-826(b) (Supp. 1961).

The typical acts, however, including recent revisions, do not make any distinction. See, e.g., Minn. Stat. Ann. § 260.158 (1959); Va. Code Ann. § 16.1-178 (1950); Wis. Stat. Ann. § 48.34 (1957).

of whether there are other adequate facilities; whether the training schools offer appropriate types of treatment; whether there is any perception by the child of a difference in the two types of commitments; and whether the "ungovernable" child living together with those who "act out" their disturbance in crimes adversely influences the values and conduct of the former.

From the standpoint of statutory improvement, there perhaps should be a device in the nature of a custody proceeding—blaming neither the child as "ungovernable" or "delinquent" nor the parent, who may be exerting all his abilities, as "neglectful"—to determine whether the child needs custody other than parental.⁴¹ And the determination should be based largely on such criteria as whether he is functioning normally in the community by regular attendance at school or employment. It is the broad discretion in both phases of the proceeding—both in adjudicating whether the child is within the court's jurisdiction as well as in his disposition—which gives the judge an extraordinary and troubling degree of power over children who are before the court though they have not broken any law.

COUNSEL IN JUVENILE PROCEEDINGS

New York and Oregon are the first states in the union to provide for the assignment of attorneys in every juvenile case if the child requests counsel and cannot secure his own.⁴² On a less inclusive basis a number of other states are also supplying attorneys in juvenile court. Compared with the situation a decade ago, when lawyers were almost unknown in juvenile cases⁴³—an appearance in one out of two hundred cases was a maximum estimate even for a metropolitan court—the new look is a remarkable contrast.

The change was produced by pressures both from above and below. From above, there were appellate rulings that a parent or child had a right under due process to appear with retained counsel;⁴⁴ representa-

⁴¹ Cf. the suggestion that in acute cases the "ungovernable" child be handled through a neglect proceeding against the parent and that the Standard Juvenile Court Act be so interpreted. Rubin, "Legal Definition of Offenses by Children and Youths," *supra* note 31, at 514-15.

⁴² N.Y.F.C.A. §§ 249, 343, 741; Ore. Rev. Stat. § 419.498(2) (1961).

⁴³ See McKesson, "Right to Counsel in Juvenile Proceedings," 45 Minn. L. Rev. 843, 845 (1961); Ketcham, *supra* note 1, at 104-05; First Interim Report California Special Study Comm'n on Juvenile Justice 20 (1959).

⁴⁴ See *People v. Fifield*, 136 Cal. App. 2d 741, 289 P.2d 303 (1st Dist. 1955); *Matter of Sippy*, 97 A.2d 455 (D.C. Munic. Ct. 1953); *Matter of Barkus*, 168 Neb. 257, 95 N.W.2d 674 (1959); *Matter of Poulin*, 100 N.H. 458, 129 A.2d 672 (1957); *Matter of Frinzi*, 152 Ohio St. 164, 87 N.E.2d 583, 588 (1949); *Matter of Brown*, 201 S.W.2d 844, 856 (Tex. Civ. App. 1947); Notes, 44 Geo. L.J. 138 (1955); 54 Mich. L. Rev. 1000 (1956).

tion became generally permitted—albeit some courts discouraged it.⁴⁵ But the question of practical importance was whether attorneys would be *assigned*. Because of the low economic level of many of the children appearing in juvenile court—combined perhaps with the parents' feeling of hopelessness or resentment towards the child or of the futility of a lawyer—attorneys were scarcely ever retained.

The United States Supreme Court has been steadily emphasizing equality of rights for indigent defendants in criminal cases and their need for assigned counsel.⁴⁶ This trend was reflected in a few appellate decisions to the effect that due process requires the assignment of counsel to indigents in delinquency cases when the hearing might be unfair and the child might be prejudiced without counsel.⁴⁷ One can venture the guess that these rulings would be upheld by the Supreme Court, even though it has to date only applied in criminal cases the principle that due process requires assignment of counsel to prevent unfairness, and even though juvenile delinquency cases have uniformly been regarded as civil for constitutional purposes.⁴⁸

If only for the sake of symmetry in the law, to borrow Cardozo's phrase, the bar became increasingly concerned with the lack of procedural protections in juvenile court in comparison to criminal or even civil cases; and this concern crystallized around the need for representation. New York's new provision for the assignment of counsel emerged in large part from an experimental assignment project conducted with foundation funds by the New York City Legal Aid Society under the leadership of the city bar association.⁴⁹

⁴⁵ See *Matter of Brown*, *supra* note 44; *Ketcham*, *supra* note 1.

⁴⁶ E.g., *Carnley v. Cochran*, 369 U.S. 506 (1962); *Chewning v. Cunningham*, 368 U.S. 443 (1962); *Reynolds v. Cochran*, 365 U.S. 525 (1961); *McNeal v. Culver*, 365 U.S. 109 (1961). *Gideon v. Cochran*, 370 U.S. 908, 932 (1962), has been reargued for the purpose of considering whether due process imposes a greater requirement than that stated in *Betts v. Brady*, 316 U.S. 455 (1942); *Betts* required assignment to indigent criminal defendants where "special circumstances" show need for counsel. [*Betts v. Brady*, *supra*, was overruled in *Gideon v. Wainwright*, 383 U.S. 363 (1966).]

⁴⁷ *McDaniel v. Shea*, 278 F.2d 460 (D.C. Cir. 1960); *Shioutakon v. District of Columbia*, 236 F.2d 666, 670 (D.C. Cir. 1956); *People v. Dotsen*, 46 Cal. 2d 891, 299 P.2d 875 (1956); compare *Lazaros v. State*, 228 S.W.2d 972 (Tex. Civ. App. 1950); *State v. Superior Ct.*, 106 Wash. 619, 180 Pac. 875 (1919).

⁴⁸ Refusal to assign counsel in a deportation proceeding (which has been held to have consequences as grave as criminal conviction, *Jordan v. De George*, 341 U.S. 223, 232 (1951)), has not been held a violation of due process. See *Madokoro v. Del Guercio*, 160 F.2d 164 (9th Cir.), cert. denied, 332 U.S. 764 (1947). Counsel can, however, be retained. *Hyun v. Landon*, 219 F.2d 404, 406 (9th Cir. 1955), *aff'd*, 350 U.S. 990 (1956).

Objections to juvenile proceedings for lack of the attributes of a criminal trial have uniformly been answered by the assertion that the proceedings are civil. E.g., *Cinque v. Boyd*, 99 Conn. 70, 121 Atl. 678 (1923); *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932); *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198 (1905).

⁴⁹ See Schimitsky, "Role of Lawyer in Children's Court," 17 Record of N.Y.C.B.A. 10 (1962). There had also been emphasis by laymen on the need for legal protection. See Community Service Soc'y of N.Y., *Justice for Youth* 11 (1955); Gellhorn, quoting U.S. Children's Bureau official, *supra* note 3, at 78. Cf. Tappan, *Juvenile Delinquency* 170 (1949).

PROS AND CONS ON NEED FOR ATTORNEYS

With few appellate rulings on the problem, evaluating a provision for assignment necessarily focuses on policy considerations and the value of counsel in juvenile court.

An early view was that the judge himself protects the child's interests in lieu of an attorney. This argument has been submerged in recognition that juvenile court judges are not a breed apart and that "As must generally be the case, the trial judge could not effectively discharge the roles both of judge and defense counsel."⁵⁰

But is there a function and need for a "defense counsel"—an advocate—for the child as there would be for a defendant in other proceedings?

The argument against representation, that most children admit their delinquency, is not persuasive that they have no need for an attorney to prepare and present evidence on their behalf. Precise development of the evidence is valuable despite the inclusive definition of delinquency and the unitary dispositive power for all types of violations. An uncounseled child's admission that he was, let us say, in a gang fight may not mean that he participated in a manner constituting any violation of law.⁵¹

An attorney's precise development of the evidence will also bear on disposition and the grave decision between commitment and probation, because the judge's estimate of the child's tendencies and needs is and should be influenced by how the child acted in the incident bringing him to court. And the child's attorney can help him in the disposition phase itself, by adducing or questioning background facts and suggesting treatment possibilities. As the Supreme Court has declared in criminal cases, defendant's attorney has an important role in the sentencing phase, though sentence is discretionary.⁵² Of course, an attorney also ensures that the child in fact receives the protections the law grants him, such as the right to adequate notice of the allegations against him or the exclusion of incompetent evidence.⁵³

⁵⁰ *Carnley v. Cochran*, supra note 46, at 510. Compare *Eskridge v. Washington Prison Bd.*, 357 U.S. 214, 216 (1958).

⁵¹ There is no logic in relying on law violations for delinquency jurisdiction unless all the elements of a breach of the law are established. The criminal law has established only that the sum of these elements show antisociality. As to proof of the element of intent, compare *Ballard v. State*, 192 S.W.2d 329 (Tex. Civ. App. 1946), with *Borders v. United States*, 256 F.2d 458 (5th Cir. 1958).

⁵² *Chandler v. Fretag*, 348 U.S. 3 (1954); *Keenan v. Burke*, 342 U.S. 881 (1951); *Townsend v. Burke*, 334 U.S. 736 (1948); *Carter v. Illinois*, 329 U.S. 173, 178-79 (1946).

⁵³ *Matter of Barkus*, 168 Neb. 257, 95 N.W.2d 674 (1959) and *Matter of Contreras*, 109 Cal. App. 2d 787, 241 P.2d 631 (2d Dist. 1952), where the courts noted that an attorney would have protected the child against the admission of unreliable evidence. See *Shioutakon v. United States*, 236 F.2d 666, 670 (D.C. Cir. 1956), and *Williams v. State*, 219 S.W.2d 509 (Tex. Civ. App. 1949), as to the advice of counsel on optional jury trial and self-incrimination, respectively.

It has been suggested that the attorney's exclusive loyalty to the defendant in a criminal case and to his client's desire to avoid conviction and sentence, is inappropriate in juvenile court and that a lawyer will therefore have a confused role in representing a juvenile.⁵⁴ The effort and hope to rehabilitate a youthful delinquent through state-imposed discipline is greater than in the case of an adult. Thus we assume a benefit to the child—which is not assumed in the case of an adult charged with crime—from an adverse adjudication and state supervision or detention when the facts of his case warrant it. In concrete terms, this view of the ultimate interest of the child may dictate that his attorney disclose evidence adverse to him.

But such an obligation would not be foreign to the law; it is like that imposed on the prosecutor in a criminal case to see "that justice shall be done."⁵⁵ While the courts have not had occasion to discuss it, an obligation of disclosure could well be viewed as appropriate for the defending attorney as an officer of the court in any case involving more than merely private interest, whether criminal or juvenile. And a special factor in the juvenile court is that there is no prosecutor to combat the attorney for the child.⁵⁶ Indeed, there is a possible boomerang from assigning attorneys in this court: the judge may be thrown into a prosecutor's state of mind by the presence of an advocate for the child but none against him. The attorney's assumption of the obligation of disclosure may help avert this danger.

ASSIGNMENT IN SELECTED CASES

Instead of providing, like New York, for the assignment of counsel in all indigent juvenile cases, several states now mandate assignment whenever the alleged violation of law amounts to a felony. And several grant the court discretion to assign in any juvenile case.⁵⁷

If assignment in juvenile cases is to be selective, the felony distinc-

⁵⁴ See Procedure and Evidence, *supra* note 27, at 42-43.

⁵⁵ *Berger v. United States*, 295 U.S. 78, 85 (1935). See also *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959); *United States ex rel. Kling v. La Vallee*, 306 F.2d 199, 201 (2d Cir. 1962); *People v. Savvides*, 1 N.Y.2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956); *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497, 498 (1899).

⁵⁶ See *McKesson*, *supra* note 43, as to the possibility of an appearance by the district attorney to balance the juvenile's representation. See *Matter of Fleishman*, 13 App. Div. 2d 818 (1st Dep't 1961); new trial ordered to permit representation of child in view of conflict in evidence; the court directed that the city corporation counsel appear also, though he did not customarily appear in juvenile cases.

⁵⁷ Cal. Welfare & Inst'ns §§ 634, 700 (1962), directs appointment of counsel in any case of an act amounting to a felony, and leaves appointment to the discretion of the judge in other cases. Wis. Stat. Ann. § 48.25(6) (1957), and Minn. Stat. Ann. § 260.155(2) (1959), provide for discretionary appointment of counsel in any case. Cf. Virginia's provision for guardian ad litem, who may be an attorney, in the absence of the parent. Va. Code Ann. § 16.1-173 (1950). See Reiderer, "Responsibility of the Bar," Summary of Procs., Am. Bar Ass'n Sec. on Family Law 76, 77-79 (1961).

tion has some merit. An adjudication against the child on such serious grounds carries moral and social opprobrium; is more likely to result in his commitment than if the charge were a minor one; and will constitute a more damaging record against him.⁵⁸ Such grave consequences require the assurance of accuracy furnished by counsel. Furthermore, in many states, including New York, the statutes do not provide for assignment of counsel, in criminal cases below the level of a felony. As against the felony distinction, all juvenile cases are heard in the same court and subject to the same powers of disposition; a commitment without an assignment of counsel merely because the charge was below the grade of a felony, would be likely to impress the child and his parents as an unjust discrimination.⁵⁹

With the differences between the programs of the several states that are now making assignments, and with the majority of juvenile courts throughout the country still wholly barren of attorneys, a virtual "controlled" experiment is in process from which the operating effect of counsel in juvenile court can be appraised.

PROCEDURAL CHANGES

Typical juvenile court acts, including New York's old act, contain few directions on procedure compared with the codes governing criminal and regular civil actions. The new New York act tightens the procedural framework. New York now has detailed rules governing arrests and detention of children prior to the court hearing, and also prescribes time-limits and periodic reconsideration of commitment and probation orders, instead of indeterminate orders.⁶⁰ (To prevent over-long detention, due

⁵⁸ A juvenile adjudication cannot be treated as a criminal conviction to impeach the defendant's credibility in a subsequent criminal trial. See *People v. Peele*, 12 N.Y.2d 890, 237 N.Y.S.2d 999 (1963); *Kiracofe v. Commonwealth*, 198 Va. 833, 97 S.E.2d 14 (1957); *Woodley v. State*, 227 Ind. 407, 86 N.E.2d 529 (1949); *State v. Coffman*, 360 Mo. 782, 230 S.W.2d 761 (1950); *Thomas v. United States*, 121 F.2d 905 (D.C. Cir. 1941); *Mason v. Klaserner*, 180 N.E.2d 870 (Ohio 1961); *Murphy v. City of N.Y.*, 273 App. Div. 492, 78 N.Y.S.2d 191 (1st Dep't 1948). Compare *State v. Homolka*, 158 Kan. 22, 145 P.2d 156 (1944). However, many statutes provide that the adjudication can be considered in determining his sentence.

The gravity of the charge was a factor in determining whether due process required assignment of counsel to an indigent criminal defendant. *Powell v. Alabama*, 287 U.S. 45, 68-71 (1932); *Betts v. Brady*, 316 U.S. 455, 462 (1942); *De Meerleer v. Michigan*, 329 U.S. 663 (1947).

⁵⁹ Missouri provides that before commitment to a state training school the juvenile shall have an opportunity to be represented by counsel at a hearing for that purpose. Mo. Ann. Stat. § 211.211 (1959). See Weinstein & Robins, *supra* note 25, at 389.

⁶⁰ N.Y.F.C.A. §§ 756(b), (c), 757(b), 758(c). Compare Minn. Stat. Ann. § 260.185(4) (1962), providing for indeterminate orders with annual judicial review, and also for orders with a duration specified by the court. See Diana, *supra* note 31, favoring temporal limits on orders of disposition.

Typically, however, a juvenile order is indeterminate for the child's minority, nor is there customarily any periodic judicial appraisal of need for its continuance. E.g., Arizona Rev. Stat. Ann. § 8-236B (1956); Cal. Welfare & Inst'ns §§ 730, 731 (1962). Cf. Note, 50 Harv. L. Rev. 677 (1937), as to periodic review of indeterminate criminal sentences.

to mistake or mere bureaucratic oversight, periodic review has also been proposed in New York and elsewhere for mental illness commitments—another type of indefinite, therapeutic, civil commitment.)⁶¹ Besides requiring notice of the hearing and other attributes of regularity, New York, similar to California, now incorporates from the criminal law the rule that a child cannot be adjudicated delinquent solely on the basis of an extra-judicial admission: that is, on testimony—in practice usually by a policeman—that the child admitted the delinquency though he now denies it or is silent.⁶²

One decided innovation in the New York act is the provision that the child shall be informed at the commencement of a hearing of his right to remain silent. While the appellate courts hold that the constitutional privilege against self-incrimination does not apply in juvenile court because the proceedings are civil,⁶³ commentators have urged that proceedings intended to give the child special protection should not deny him a protection accorded adults.⁶⁴ Of less semantic but more realistic significance, children as well as adults can benefit from the values of the privilege in terms of preserving the individual's self-respect and integrity.⁶⁵ The major argument on the other side is that telling the child

⁶¹ N.Y.C.B.A., *Mental Illness and Due Process* 27-28 (Recommendations by Special Comm. to Study Commitment Procedures in cooperation with Cornell Law School (1962) recommends that all commitment orders be limited, with extension possible on application by the hospital. However, in American Bar Foundation, *The Mentally Disabled and the Law* 130, 404, 414 (1961), it is only recommended that a periodic review be undertaken by hospital authorities. The contrast raised the question of the necessity for court supervision of review by the administering authorities.

⁶² N.Y.F.C.A. § 744(6). Cal. Welfare & Inst'ns § 701 (1962), provides, with some ambiguity with respect to whether the admission is sufficient basis for adjudication: "When . . . the minor has made an extrajudicial admission . . . and denies the same at the hearing, the court may continue the hearing . . . to enable the probation officer to subpoena witnesses . . . to prove the allegations of the petition." See *Oppen v. United States*, 348 U.S. 84, 91-92 (1954); *Wigmore*, *Evidence* §§ 1055, 2071, 2075 (3d ed. 1942), as to the rule in criminal cases. While corroboration is there required, the admission is admissible under the exception to the hearsay rule for admissions against interest. *Paoli v. United States*, 352 U.S. 232, 240 (1957).

⁶³ See *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932); *State v. Shardell*, 153 N.E.2d 510 (Dist. Ct. Ohio 1958); *Matter of Holmes*, 379 Pa. 599, 109 A.2d 523 (1954), cert. denied, 348 U.S. 973 (1955); *Matter of Mont*, 175 Pa. Super. 150, 102 A.2d 460 (1954); *Matter of Dargo*, 81 Cal. App. 2d 208, 183 P.2d 282 (1947); cf. *Ex parte Tahbel*, 46 Cal. App. 755, 189 Pac. 804 (2d Dist. 1920); *Williams v. State*, 219 S.W.2d 509 (Tex. Civ. App. 1949); *Ballard v. State*, 192 S.W.2d 329 (Tex. Civ. App. 1946)—the latter two cases to be read with *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944).

⁶⁴ See, e.g., Note, "Due Process in the Juvenile Courts," 2 Catholic U.L. Rev. 90 (1952). See also, in support of according the privilege, Lou, *Juvenile Courts in the United States* 130 (1927); U.S. Children's Bureau, *Specialized Courts Dealing With Children* 54 (1954). In practice, the privilege was accorded in some courts though not constitutionally necessary. Note, "The California Juvenile Court," 10 Stan. L. Rev. 471, 497-98 (1958).

⁶⁵ The dignity of the individual seems demeaned when he is compelled to publicly confess misconduct, and to choose between self-protection and the commission of perjury. See *Ex parte Cummings*, 71 U.S. (4 Wall.) 277, 331 (1866), quoting Alexander Hamilton: forcing answers to incriminating questions is "to hold out a bribe to perjury." See also *Ullman v. United States*, 350 U.S. 422, 430-31, 438-39 (1956).

he need not talk discourages the rapport between child and court officials which is a main objective in juvenile proceedings. In practice the child may well testify though not compelled; communication by the child in an atmosphere of free choice is the best of both worlds.

Statutory creation of the privilege of silence should be correlated with establishment of a program for assignment of attorneys.⁶⁶ The juvenile court judge, sitting without a jury, may draw an adverse inference from the child's silence, and the question of whether the privilege should be adopted or waived is a subtle one on which the child needs the advice of counsel.

USE OF "SOCIAL EVIDENCE"

How to use "social evidence"—information on the individual's personality, capacities, relationships, and environment—is a crucial issue for all family court proceedings.

Under the new New York Family Court Act, juvenile cases as well as some other types will use social data in a preliminary "intake" phase, which has long been a feature of juvenile courts.⁶⁷ In intake a court officer determines whether a formal proceeding should be initiated or whether an attempt at adjustment through social case-work methods should first be assayed, without a court hearing and adjudication.⁶⁸ For juvenile proceedings, a great issue has been whether a complaining policeman or a victim of a child's violation of law must be permitted the opportunity he would have in a lower criminal court to initiate a proceeding against the child,⁶⁹ or whether the intake officer and the judge can exercise over-

⁶⁶ See *Shioutakon v. United States*, 236 F.2d 666, 670 (D.C. Cir. 1956), as to the need for counsel to advise on optional statutory privileges.

⁶⁷ See N.Y.F.C.A. §§ 734 (delinquency and supervision cases), 333 (neglect), 424 (support), 823 (family offenses); Kaln, *Court for Children* 61 (1953); Teeters & Reinemann, *Challenge of Delinquency* 319, 327 (1950).

⁶⁸ There is one school of thought that such casework should not be undertaken by the court and that the individuals should be referred to a voluntary social agency unless a proceeding is begun. See Young, *Social Treatment in Probation and Delinquency* 243-47 (1952); cf. Fields, "Guideposts for Juvenile Court," 22 *Fed. Prob.* 12 (1958); Tappan, "Unofficial Delinquency," 29 *Neb. L. Rev.* 547 (1950). However, the predominant view is that "unofficial" casework is desirable—subject, according to some authorities, to the conditions that it be limited to a short period and that it appears jurisdiction over the child could be established in the event of a judicial hearing. See Rubin, "Legal Character of Juvenile Delinquency," *supra* note 31, at —. N.Y.F.C.A. § 734(a)(ii)(c); Cal. Welfare & Inst'ns § 721 (1962); Ky. Rev. Stat. § 208.070 (1962); Wis. Stat. Ann. § 48.19 (1957). The objection that the child is coerced to accept the "unofficial" casework by fear of a court proceeding if he refuses, seems an insubstantial interference with his liberty, compared, for example, to the coercion in a criminal case to plead guilty to a lesser offense to avoid trial for a greater.

⁶⁹ E.g., N.Y. Code Crim. Proc. § 150 (2): a warrant or summons must issue if the judge is "satisfied . . . that there is reasonable ground to believe" defendant has committed the crime.

However, since it is justifiable to create a juvenile court and abolish criminal responsibility for a child's violation of law, by the same token seemingly, a juvenile proceeding

riding discretion. New York's new act, while providing for adjustment efforts in intake, permits an insistent complainant in juvenile and other Family Court proceedings to begin a formal action.⁷⁰ Some of the juvenile court acts have dispensed with this assurance of access to judicial process.⁷¹

It is at the other end of the proceeding, in determining the proper order of disposition, that social data reaches greatest importance.⁷² Indeed the use of medical, psychiatric, psychological, and background reports in disposition is the essence of the juvenile court therapy which a family court purports to extend to other proceedings. The issue here is whether these reports should be disclosed to the child and his parents so that they will have an opportunity to refute inaccuracies or present countervailing considerations.⁷³

The New York draftsmen came almost full circle on this issue. Their initial proposal was that the reports be furnished to the parties as well as to the court, except that the court might withhold medical data and psychiatric diagnoses.⁷⁴ This proposal was strongly opposed on the two grounds that child and parents might suffer psychologically from knowledge of the reports, and that the practice of disclosing them would deter relatives, teachers, neighbors, and other members of the community from giving information to probation workers. The result was the present provision that the reports are confidential to the court, with judicial discretion to disclose them in whole or part.⁷⁵ Elsewhere, several states by statute require that the entire report be open to the inspection

against the child can also be banned when the public interest so requires. Cf. note 7 *supra*, as to denial of remedies in connection with a civil cause of action.

⁷⁰ N.Y.F.C.A. §§ 734(b), 333(b), 424(b), 823(b). The new Rhode Island Family Court Act mandates an intake service for "juvenile" cases, but otherwise merely provides that intake will assume whatever duties are assigned by the court. R.I. Gen. Laws Ann. § 8-10-22 (1956).

⁷¹ Cal. Welfare & Inst'ns § 721 (1962), provides that no petition "shall be filed without the approval of the probation officer except by order of the juvenile court." See also Ariz. Rev. Stat. Ann. § 8-222 (1956); Wis. Stat. Ann. § 48.19 (1957); cf. Va. Code Ann. § 16.1-164 (1950).

⁷² An adjudication of delinquency—a determination of whether it was committed and the court therefore has jurisdiction—cannot be based on a background report. *Krell v. Mantell*, 157 Neb. 900, 62 N.W.2d 308 (1954); *Diana*, *supra* note 31, at 565; Waite, "How Far Can Court Procedure Be Socialized Without Impairing Individual Rights?" 12 J. Crim. L., C & P.S. 339 (1922). However, in practice judges frequently see the report during the adjudicatory phase of the proceedings. See Note, "Correct Use of Background Reports in Juvenile Delinquency Cases," 5 Syracuse L. Rev. 67 (1953); Young, *supra* note 69, at 212.

⁷³ See Paulsen, "Fairness to the Juvenile Offender," 41 Minn. L. Rev. 547, 567 (1957), on importance of these considerations. As to the basic principle that fairness and accuracy requires opportunity for refutation: *Greene v. McElroy*, 360 U.S. 474, 496-99 (1958). The problem arises in a variety of situations. See disapproval of use of undisclosed reports in denial of admission to bar: *Matter of Burke*, 87 Ariz. 336, 351 P.2d 169 (1960).

⁷⁴ Report of New York Joint Legislative Comm. on Court Reorganization, pt. II at 123 (1962).

⁷⁵ N.Y.F.C.A. § 746(b).

of the parties or included in the record.⁷⁶ Absent a statute, the few appellate courts that have considered the question have held that disclosure of reports is not required in juvenile cases and this view has been generally adopted in practice.⁷⁷

FOR OR AGAINST DISCLOSURE?

How should the pros and cons of disclosure be resolved? For a judge to make the grave decision to commit a child to an institution, without allowing the child or his parents any opportunity to correct misinformation or offset the data in the reports, seems dictatorial and unfair. The argument that disclosure will have the effect of drying up sources of information is not too compelling: the probation worker's informants are not undercover agents who must continue to function in secret, as the argument runs in narcotic prosecutions and the like.⁷⁸ Further, the practice could be borrowed from internal security cases of a discretionary deletion of names and the informant thus assured of anonymity; the problem here is not confidentiality in the sense of some of the testimonial privileges, where the information itself is intended to be confidential.

Of more moment than the problem of sources: the child or his parents may well suffer serious psychological damage from confronting a report that categorizes their inadequacies and depicts their images as others see them. Is it therapeutic to declare to a parent that his neighbors observe him drinking or that he has been judged of low intelligence or that

⁷⁶ Cal. Welfare & Inst'ns § 827 (1962); Ky. Rev. Stat. § 208.140 (1962). See *Matter of Dattilo*, 136 Conn. 488, 72 A.2d 50 (1950), with respect to rule of court providing for inclusion of report in record and cross-examination of its author. The new Rhode Island Family Court Act provides that in all its proceedings, which include juvenile proceedings, the parties can examine the background report, cross-examine its author, and introduce evidence to controvert it. R.I. Gen. Laws Ann. § 8-10-9 (Supp. 1962). Reports of medical, psychiatric, or psychological examinations apparently are not covered by this provision. *Id.*, § 8-10-8.

On the other hand, Oregon expressly states "reports and other material relating to the child's history and prognosis" shall not be part of the record, and Virginia provides that all statements to court employees are privileged unless the judge orders their disclosure. Ore. Rev. Stat. § 419.567(2) (1961); Va. Code Ann. § 16.1-209 (1960).

Most statutes, including the recent Wisconsin and Minnesota revisions, have no provision on whether the reports should be disclosed.

⁷⁷ *Matter of Holmes*, 379 Pa. 599, 109 A.2d 523 (1954), cert. denied, 348 U.S. 973 (1955); cf. *Matter of Caronna*, 197 La. 494, 2 So. 2d 1 (1941). Compare *Ex parte Rixen*, 74 N.D. 80, 19 N.W.2d 863 (1945), disapproving revocation of order of probation and consequent commitment, on the basis of information not of record. And see *Matter of Toorans*, 154 N.Y.S.2d 160 (Sup. Ct. Kings County 1955), applying statute which requires hearing for revocation of probation, though there was no statutory requirement for a hearing when the judge made the original choice between probation and commitment.

In *McMullan*, "Lawyer's Role in Juvenile Court," 8 Prac. Law. Apr. 1962, p. 49, 52, the author says that in his court he permits a child's attorney "to know all the evidence and facts upon which the judge acts," on the understanding that the attorney will regard it as confidential. As in other juvenile courts, however, the child is not usually represented by an attorney.

⁷⁸ See *Roviaro v. United States*, 353 U.S. 53, 59-60 (1957).

his claimed affection for his child covers rejecting behavior, or to spell out that a child is illegitimate or shunned in the neighborhood as a troublemaker or disapproved by his teacher as the least responsible child in the class? The objective of the juvenile court is to help parents and child to a better adjustment. Might not such unsought and wounding revelations affect the individual's self-confidence and his relationships and block therapy not only immediately but indefinitely?

Social workers with a high sense of professional ethics say they would tailor a report to prevent psychological damage from its disclosure. The result of a disclosure practice may well be reporting on a vague and superficial level.⁷⁹ The judge does not need a report in the depth and detail required for psychiatric or social casework. Still, disclosure of background reports will accomplish nothing if they become so general that the judge must either reject them entirely or in effect accept the probation worker's *ipse dixit*. Thus, there must be a measure of flexibility in a disclosure requirement so that psychological damage can be avoided. The present New York provision, however, emphasizing confidentiality and leaving disclosure entirely to the judge's discretion, seems too lax.

The New York Family Court Act adopts this confidentiality provision for all the proceedings in which reports are used,⁸⁰ except that in child custody cases it leaves the problem to the common law. I suggest that the case-by-case development already had in the child custody field can be instructive in formulating a flexible but protective rule on disclosure for juvenile and other Family Court proceedings.

USE OF REPORTS IN CUSTODY CASES

In determining which parent should get the child following a matrimonial dissolution or separation, social-minded judges have, with the rise of the behavioral sciences, recognized that they need not only the wisdom of Solomon, but background information and expert diagnosis.⁸¹ In New York City with its great number of custody cases, court reform groups urged without success for a number of years that the court granting custody establish a social investigation service. Finally, after a "Family Counseling Unit" had been launched with foundation funds

⁷⁹ See Ass'n of Bar of N.Y.C., Reports on Proposals of Joint Legislative Comm. 41-42; Family Serv. Ass'n of Am., The Lawyer and the Social-Worker 17-18 (1959), as to social worker's apprehension of compulsion to reveal confidential statements.

⁸⁰ N.Y.F.C.A. §§ 347(b), 435(b), 625(b), 746(b).

⁸¹ See *Herb v. Herb*, 8 App. Div. 2d 419, 188 N.Y.S.2d 41 (4th Dep't 1959), where there had been a stipulation for a custody investigation by a private social agency; *Gluckstern v. Gluckstern*, 2 App. Div. 2d 744, 153 N.Y.S.2d 184 (1st Dep't 1956), where case was remanded for custody investigation by social-worker (after investigation, same custody order was made as prior thereto: 17 Misc. 2d 83, 158 N.Y.S.2d 504, *aff'd*, 3 App. Div. 2d 999, 165 N.Y.S.2d 432; 4 N.Y.2d 521, 151 N.E.2d 897, 176 N.Y.S.2d 352 (1958)).

under the aegis of the city bar association, this Unit became an agency of the courts—another example of a pilot project for court service initiated under private auspices and growing into a public program.⁸²

The approach in child custody to disclosure of reports has been quite different from that in delinquency. In child custody the controlling legal consideration is that the reports are used in an adjudication of the competing *rights* of the parents, rather than in an exercise of judicial discretion, and that due process therefore requires a basis in *evidence*. Thus, in child custody cases the psychological disadvantages of disclosure have been subordinated to the legal need to give the affected party an opportunity to know and contest adverse evidence.⁸³ And there has been much greater litigation and consideration of the whole issue of disclosure in child custody than in juvenile court cases. Due to the higher income level of custody litigants, the parties are represented by attorneys, and are more assertive and more expectant of recognition by the court of their demands and interests.

Let us briefly consider the conceptual difference between custody and delinquency cases. The pre-disposition reports in a juvenile case have been considered analogous to pre-sentence reports in a criminal case, and it is said that due process permits the judge to treat the latter as confidential advice to inform his discretion.⁸⁴ However, even in a criminal case there is a good argument, despite the much-cited *Williams* decision, that discretion must be exercised on valid premises and that a defendant therefore has a right to some opportunity to contest the accuracy of the reports about him.⁸⁵ In any event, social data has a higher valence, war-

⁸² "The Family Part, A Report of Special Committee on Family Part of Supreme Court," 12 Record of N.Y.C.B.A. 89 (1957). Use of the unit lies in the court's discretion. In some other courts a social investigation is mandatory; e.g., under an Ohio law enacted in 1951 a social investigation is required in divorce cases when there are children under 14. Chute, "Divorce and the Family Court," 18 Law and Contemp. Prob. 49, 53-62 (1953).

⁸³ See, e.g., *Fewell v. Fewell*, 23 Cal. 2d 431, 144 P.2d 592 (1943); *Williams v. Williams*, 8 Ill. App. 2d 1, 130 N.E.2d 291, 294-95 (1955); *Tumbleson v. Tumbleson*, 117 Ind. App. 455, 73 N.E.2d 59 (1947); *Test v. Test*, 131 N.J. Eq. 197, 24 A.2d 226 (Ch. 1942); *Matter of Gupton*, 238 N.C. 303, 77 S.E.2d 716 (1953); *Crawford v. Crawford*, 256 S.W.2d 875 (Tex. Civ. App. 1952); *Wunsch v. Wunsch*, 248 Wis. 29, 20 N.W.2d 545 (1945); Note, "Use of Extra-Record Information in Custody Cases," 24 U. Chi. L. Rev. 349 (1957). In absence of statute the holdings in custody cases are either that reports cannot be used at all, or that they must be disclosed unless the parties stipulate otherwise. See also note 87, *infra*.

In *Tapscott v. Tapscott*, 149 Cal. App. 2d 379, 308 P.2d 399 (1957), the stipulation provided for copies of the report to the parties and cross-examination of its author; he gave a "detailed explanation" of it from the witness stand. *Id.* at 383, 308 P.2d at 401.

Despite opposition by social workers to disclosure in juvenile cases, the Community Service Society of New York, a social casework agency, joined in recommending disclosure in custody cases as well as cross-examination of the probation officer. See Special Comm. on Ct. Reorg. of N.Y.C.B.A. & Com. Serv. Soc'y, "Proposed Report on Family Court Act," app. p. 5 (1961).

⁸⁴ See *Matter of Holmes*, 379 Pa. 599, 109 A.2d 523, 526-27 (1954), cert. denied, 348 U.S. 973 (1955).

⁸⁵ *Williams v. New York*, 337 U.S. 241, 244 (1949), held that a judge did not violate due

ranting a different order of attention, in juvenile than in criminal proceedings: social data to determine treatment needs was visualized as the mainspring of a juvenile proceeding, whereas social data was a late-comer in criminal trials, already encrusted with precedent on sentencing. Further, a juvenile proceeding is denominated, like a custody proceeding, civil; and the judge's main concern is not punishment but the disposition conducive to the child's welfare, including the best hands to hold his custody. Thus, both the "method of philosophy" and the "method of sociology"⁸⁶ suggest a transfer of learning from custody to juvenile cases.

ADAPTATION TO JUVENILE CASES OF PRACTICES IN CUSTODY PROCEEDINGS

In the prevailing view, including New York's, the courts countenance complete confidentiality of the reports in custody cases if the parties so stipulate.⁸⁷ However, there is merit in the opposing stand that secrecy cannot be stipulated.⁸⁸ For, the purpose of disclosure is to check the accuracy of the report to assure a valid determination, and courts repeatedly declare that the proper award of custody is a matter of public concern. In any event, delinquency cases are in no sense private controversies, and solving the disclosure question by stipulation would have even less place than in custody proceedings.

More promising for juvenile cases, when full disclosure of the reports

process by considering background reports which had not been open to inspection by defendant, in rejecting the jury's recommendation of life imprisonment and instead imposing the death sentence. However, the Supreme Court noted that the trial judge had referred to statements in the reports on which he was relying, and Williams did not challenge them.

As to disclosure of pre-sentence reports, see Wyzanski, "Trial Judge's Freedom and Responsibility," 65 Harv. L. Rev. 1281, 1291 (1952); Hincks, "In Opposition to Rule 34(c)(2)," 8 Fed. Prob. 3 (1944); Note, "Employment of Social Investigation Report in Criminal and Juvenile Proceedings," 58 Colum. L. Rev. 702, 705 (1958).

For development of the doctrine that a discretionary determination is invalid if based on irregular procedure or erroneous grounds, see *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957); *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

⁸⁶ Cardozo, *The Nature of the Judicial Process* 31-39, 66-72 (1921). See *Matter of Rosmis*, 26 Ill. App. 2d 226, 231, 167 N.E.2d 826, 828 (1960), where the Williams case, *supra* note 83, was applied in a juvenile proceeding involving custody, without mention of the difference in the nature of the proceedings.

⁸⁷ See *Kessler v. Kessler*, 10 N.Y.2d 445, 180 N.E.2d 402, 225 N.Y.S.2d 1 (1962), remanding custody case because the trial judge had considered psychiatric report which was not covered by stipulation. The court disapproved the Herb decision, see note 81 *supra*, where the stipulation technique had been rejected. On the Kessler remand, the judge based the custody determination largely on his conversation with the child, for which the parents stipulated confidentiality. 149 N.Y.L.J. Jan. 8, p. 15, col. 2, 1963.

Upholding stipulations: *Rea v. Rea*, 195 Ore. 252, 245 P.2d 884 (1952); *Crawford v. Crawford*, 256 S.W.2d 875 (Tex. Civ. App. 1952); *Onderdonk v. Onderdonk*, 3 Wis. 2d 279, 88 N.W.2d 323 (1958). See *Lawrence v. Hosfield*, 51 Wash. 157, 316 P.2d 1102, 1103 (1957).

⁸⁸ See *Scott v. Cohn*, 231 Ill. 556, 83 N.E. 191 (1907) (cited with approval in Williams, *supra* note 83): discretion as to custody must be based on evidence submitted in court and subject to appellate review; "The agreement of counsel cannot bind as to the interests of the minor." *Id.* at 559, 83 N.E. at 192.

seems psychologically harmful, would be an adaptation of the view in custody cases that the judge should use the report for leads in questioning witnesses. In this way there is an opportunity for refutation and development of information, and the social data is "woven into the fabric of the record."⁸⁹ However, it seems unwise to insist, as some of the custody decisions do, that the judge cannot rely on a reported fact unless there is also "common law evidence" of it.⁹⁰

Assume that a probation report concerning a child's home discipline relates information from a neighbor that he frequently comes home after midnight. The judge believes that disclosure of the neighbor's identity or even of the details of the report will destroy the neighbor's beneficial relationship to the child. Under questioning by the judge the child denies he keeps late hours, but the judge disbelieves him. If the judge relies on the report without calling the neighbor or even the probation worker to the stand, he is obviously relying on a report of hearsay. But the technique of exploring the issue with the child seems a tolerable compromise.⁹¹ It is a compromise between the interest in accuracy and exposing decision-influencing factors on the one hand, and the interest in preventing psychological damage from full disclosure on the other. To effect the compromise the judge must be allowed a measure of discretion. But the statutory emphasis should be on disclosure rather than concealment, and the judge should be directed either to disclose the report or to rely only on facts subjected to a courtroom check.

The social worker's recommendation—as distinguished from the background data he reports—or a physician's, psychiatrist's, or psychologist's

⁸⁹ *Fields v. Kaufman*, 9 App. Div. 2d 375, 378, 193 N.Y.S.2d 789, 792 (1st Dep't 1959); *Schlanger v. Schlanger*, 8 App. Div. 2d 801, 187 N.Y.S.2d 921 (1st Dep't 1959).

⁹⁰ See *Kessler*, *supra* note 87, 10 N.Y.2d at 454-57, 180 N.E.2d at 406-08, 225 N.Y.S.2d at 8-10. Cf. Note, 10 Stan. L. Rev. 471, 495 (1958), as to admissibility of probation officer's testimony. Compare practice in other proceedings of judge's calling expert investigator: Beuscher, "The Use of Experts by the Courts," 54 Harv. L. Rev. 1105, 1107, 1117 (1941); Note, 38 Colum. L. Rev. 369 (1938).

The common law rule against hearsay is disregarded under statutes and rulings that permit reliance on background reports so long as they are disclosed. *Jenkins v. Jenkins*, 304 Mass. 248, 23 N.E.2d 405 (1939); *Fewell v. Fewell*, 23 Cal. 2d 431, 144 P.2d 592 (1943). This practice is, as Professor Gellhorn points out, consistent with the traditional flexibility of procedure in equity and habeas corpus cases. Gellhorn, *Children and Families in the Courts of New York City* 333-34 (1954).

⁹¹ The manner and degree of disclosure can be adapted to the occasion without sacrifice of a fair hearing. See *United States v. Nugent*, 346 U.S. 1, 6-7 (1953): sufficient to furnish résumé of adverse information with respect to status as conscientious objector to military service.

Cf. Israeli practice of receiving evidence from victims of sex crimes by deposition to spare them the embarrassment of testifying. Geis, "Juvenile Justice: Great Britain and California," 7 *Crime & Delin.* 111, 114 (1961).

Compare *State v. Reister*, 80 N.W.2d 114 (N.D. 1956) where the testimony of adults to whom young children had talked directly after a sex crime was received instead of the testimony of the children.

diagnosis, are not facts that the child or his parents are capable of denying or confirming (and their offering a contradictory expert is not a practical possibility in most juvenile proceedings because of the family's social and economic level). Thus, the disclosure of diagnoses or prognoses or reference to them in questions, is not as vital to accuracy as in the case of background data. However, whether or not the judge discloses these expert opinions, he should check their reliability by questioning the child and his parents at the least on the number and length of their contacts with the diagnosticians. It may turn out that the diagnostician based a very unfavorable opinion on a very fleeting contact.⁹²

A direction to the judge to rely only on those factual statements in the reports which, if not fully disclosed, have at least been subjected to the test of courtroom questioning, imposes a sort of "honor system" on the judge. But throughout the law we rely on the judge's sturdiness in closing his mind to illegal entries.⁹³ A courtroom screening of the reports would give them a passably solid footing and would check their too-casual acceptance.

PRIVILEGE FOR THE SOCIAL CASEWORKER

Quite a different issue of confidentiality is posed by the communications of the child or his parents to a social caseworker, as contrasted with informants' statements about them. The latter information is destined for the court, even though the informant may not want it revealed to the parties. But the child and parents may make statements to a caseworker that they want kept secret from all others, including the judge. Indeed, the workers' success may in part be measured by the flow of such private thoughts and feelings; by the degree of self-revelation.⁹⁴

Thus we have here the problem of confidentiality in the sense that

⁹² *Matter of Torrans*, 154 N.Y.S.2d 160 (Sup. Ct. Kings County 1955): In a habeas corpus proceedings, it appeared that psychiatric diagnosis of mother, which had been a major reason for child's commitment, was formulated without any substantial contact with the mother.

⁹³ E.g., *Matter of Brown*, 201 S.W.2d 844 (Tex. Civ. App. 1947); *Matter of Bentley*, 246 Wis. 69, 16 N.W.2d 390 (1944): hearsay would have invalidated juvenile adjudication if there had been a jury, but it would be assumed judge did not consider it. Compare decisions reversing convictions for contempt of court: "Weak characters ought not to be judges." *Pennekamp v. Florida*, 328 U.S. 331, 357 (1946). See also *Craig v. Harney*, 331 U.S. 367, 376 (1947); see *Maryland v. Baltimore Radio Show*, 338 U.S. 912-14 (1950) (opinion by Frankfurter, J., on denial of certiorari).

⁹⁴ Under the present New York legislation, these statements are covered by the provision on nondisclosure of reports to the parties, but are not otherwise accorded confidentiality, nor are statements made in the course of "informal" casework in intake; the only protection here is that they cannot be used in an adjudicatory hearing or in a criminal case prior to conviction, N.Y.F.C.A. §§ 735, 834. However, statements made in the course of a marriage conciliation effort cannot be used in evidence in any proceeding. N.Y.F.C.A. § 915. As to such statements in California, see Note, "The Work of the 1939 California Legislature," 13 So. Cal. L. Rev. 1, 4-43 (1939); in England, Note, 23 Sol. J. 136, 164, 194, 219 (1956).

underlies the common law testimonial privileges. The social value of freedom to communicate—the justification for the testimonial privileges—is highly compelling here, more compelling than in some of the privileges now recognized by law.⁹⁵ It is speculative whether husbands and wives would confide in each other less if the testimonial privilege for their confidential communications were abolished; or whether a patient with a medical necessity for communication would withhold information from a physician.⁹⁶ In recent years statutes in a number of states have created a testimonial privilege for newsmen, on the justification that the flow of news would be encouraged by assurance to informants and newsmen that sources of information need not be disclosed in court. Here again it is dubious whether the privilege actually produces greater expression of opinion.⁹⁷

In the case of a social worker in a juvenile case, his assurance to the child and his parents that their confidence will not be revealed either in reports or on the witness stand, would have an immediate and direct effect on their feeling of freedom to communicate. And here there is no other individual whose rights are adversely affected by according the privilege, as there may be in other situations, for example, when a defendant is refused information which would help in his defense or when a victim of libel is unable to recover. A balancing of one right against another would be required in determining whether to establish a general testimonial privilege for social workers. But in our situation the issue is only what is more helpful to the child—the judge knowing all his and his parents' statements to the caseworker or their confidential relationship with the worker.

The social worker-client privilege need not be accorded to every aspect

⁹⁵ Freedom to communicate is the value underlying privilege in the sense of immunity from liability for libel (see *Barr v. Matteo*, 360 U.S. 564, 571-73 (1959); *Handler & Klein*, "The Defense of Privilege in Defamation Suits Against Government Executive Officials," 74 *Harv. L. Rev.* 44 (1960)), as well as privilege in the sense of freedom from compulsion to disclose.

⁹⁶ As to the testimonial privilege of a spouse, see *Pereira v. United States*, 347 U.S. 1, 3-7 (1954); *DeParcq*, "The Uniform Rules of Evidence: A Plaintiff's View," 40 *Minn. L. Rev.* 301 (1955); *Note*, 58 *Colum. L. Rev.* 126 (1958); of physicians, accorded by statute in more than 30 states: *Note*, 54 *Mich. L. Rev.* 423 (1956). See *Chafee*, "Privileged Communications," 52 *Yale L.J.* 607 (1943), casting doubt on the need for the physician-patient privilege from the standpoint of encouraging communication.

⁹⁷ See *Garland v. Torre*, 259 F.2d 545 (2d Cir.) cert. denied, 358 U.S. 910 (1958); *Notes*, 72 *Harv. L. Rev.* 788 (1959), 54 *Nw. U.L. Rev.* 243 (1959). The newsman's privilege has been accorded by statute in about a dozen states. New York now accords a privilege of confidentiality to registered psychologists equivalent to the attorney-client privilege. *N.Y. Educ. Law*, § 7611 (added by N.Y. Sess. Laws 1956). See *Louisell*, "The Psychologist in Today's Legal World: Part II," 41 *Minn. L. Rev.* 731 (1957). As to the related profession of marriage counselling, see *Comment*, 106 *U. Pa. L. Rev.* 266 (1957). See also "A Critical Examination of Some Evidentiary Privileges: A Symposium," 56 *Nw. U.L. Rev.* 206 (1961); 71 *Yale L.J.* 1226, 1254 (1962).

of their communication but like the husband-wife privilege, only to statements intended to be confidential.⁹⁸ However, the distinction employed in the physician-patient privilege between diagnosis and treatment would not be valid here, for the relationship with the caseworker should be therapeutic from its commencement.⁹⁹ Nor should there be reservation about the privilege because the social caseworker is employed by the court, rather than privately. A court-worker must be enabled to establish the same full and therapeutic relationships with child and parents as the employee of a private agency, else the purpose of expanding court services cannot be fully fulfilled.¹⁰⁰

Evolving appropriate techniques for disclosure and confidentiality, will be an important concern in all proceedings in the Family Court in New York and elsewhere, as they come to rely more and more on social data. A judge who is a propelling and guiding force in the extension of social services in the New York courts foresees that:

This body of (behavioral) experts will develop increasingly the data bearing upon issues. . . . Every indication confirms the future widening of the breaches already made in the walls of the juvenile and family courtroom. . . . It will . . . in my judgment, become necessary to distill from our present rules of evidence evidentiary principles pragmatically suited to the evolving procedures.¹⁰¹

⁹⁸ The judge should give great weight to the social worker's view as to the confidential intention. Guttmacher & Weihofen, *Psychiatry and the Law* ch. 12 (1953), suggests acceptance of a psychiatrist's judgment on whether a statement to him was intended to be confidential.

⁹⁹ The privilege is accorded for statements made during psychiatric treatment, but not during an examination to determine sanity or competence. In *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955), a problem was posed by a combination of the two functions; the privilege was honored.

¹⁰⁰ Young, *supra* note 69, at 59, 214, believes the client should realize that statements to a court officer cannot be confidential. However, she points out that treatment starts with the client telling his "story" to the social worker during the investigation.

Conn. Gen. Stats. 17-67 (1958), provides that conversations between the judge and the child in juvenile proceedings are privileged.

¹⁰¹ Botein, "The Future of the Judicial Process: Challenge and Response," 15 *Record of N.Y.C.B.A.* 152, 158-60 (1960).